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7 On Behalf of Plaintiff Donald J. Beardslee

E-filing

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

JF

10 DONALD J. BEARDSLEE,

11 Plaintiff,

12 v.

13 JEANNE S. WOODFORD, Director of
14 the Department of Corrections, JILL L.
15 BROWN, Acting Warden of the
16 California State Prison at San Quentin,
17 and DOES 1-50.

18 Defendants.

Case No

04 5381

DEATH PENALTY CASE:
EXECUTION DATE SET

**MOTION FOR EXPEDITED
DISCOVERY AND TO COMPEL
PRODUCTION OF DOCUMENTS**

EMERGENCY ACTION
REQUESTED

LODGED

DEC 27 2004

CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

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1 I. NOTICE OF MOTION AND MOTION

2 PLEASE TAKE NOTICE that as soon as this motion can be set for hearing on
3 an emergency basis, plaintiff will move this court for the following orders:

4 Pursuant to FRCivP 26(d), plaintiff moves for an order permitting discovery to
5 go forward without compliance with the procedures and timelines set out in FRCivP 26(f).
6 Plaintiff asks this court to 1) allow discovery to proceed immediately; 2) require the parties to
7 serve discovery requests personally or by fax; 3) require the parties to serve objections to
8 discovery requests in person or by fax within one day of being served; 4) require the party
9 serving objections to be available for a meet and confer session on the day following the
10 service of objections even if objections are served on Friday or the day before a holiday, and
11 5) establish a briefing schedule for motions to compel pursuant to which all papers would be
12 served in person or by fax, the opposition and reply papers would each be filed and served
13 one day after filing and service of, respectively, the moving and opposition papers. Pursuant
14 to FRCivP 37 and L.R. 37, plaintiff also moves for an order compelling production of
15 documents related to California's lethal injection procedure, which documents shall be
16 described below.

17 In light of plaintiff's impending execution date of January 19, 2005, plaintiff
18 asks that this court set a briefing schedule that will allow this motion to be heard on December
19 23, 2004. Establishing expedited discovery procedures for this litigation now is necessary so
20 that, should this court deny the companion motion for preliminary injunction, plaintiff will
21 have sufficient time to conduct discovery in order to develop support for a motion for
22 summary judgment and/or a stay of execution.

1 II. MEMORANDUM OF POINTS AND AUTHORITIES

2 A. Procedural Background

3 Plaintiff is confined in San Quentin State Prison under sentence of death. On
4 December 16, 2004, the San Mateo County Superior Court set January 19, 2005 as the date
5 for plaintiff's execution. No stay of execution is currently in place.
6

7 Plaintiff is concurrently filing a complaint under 42 U.S.C. § 1983 challenging
8 California's lethal injection procedure. Plaintiff alleges that California's procedures, to the
9 extent they have been made public, create an unacceptable risk that plaintiff will experience a
10 level of pain and suffering during his execution that offends the Eighth Amendment to the
11 United States Constitution. Plaintiff further alleges that the use of pancuronium bromide, a
12 paralyzing neurotoxin, during the execution process violates plaintiff's First Amendment
13 rights to communicate during his execution that the procedure has malfunctioned, that he has
14 not been properly sedated and that he is being, or without intervention will be, tortured.
15 Plaintiff has exhausted his administrative remedies prior to bringing suit. Plaintiff is also
16 concurrently filing a motion for a temporary restraining order, preliminary and permanent
17 injunctive relief to halt the execution while his claims can be litigated.
18

19 B. Good Cause Exists to Allow Discovery to Go Forward Immediately

20 FRCivP 26(d) provides as a general rule that no discovery shall take place
21 before the parties have met and conferred as required by FRCivP 26(f). Both Rule 26(d) and
22 Rule 26(f) permit this Court to relieve the parties from the procedures otherwise required by
23 Rule 26(f). This Court should do so here.
24

25 The negotiated give and take contemplated by Rule 26(f) has little application
26 to this case. Rule 26(f) provides in pertinent part:
27
28

1 "Except in categories of proceedings exempted from initial
2 disclosure under Rule 26(a)(1)(E), or when otherwise ordered, the
3 parties must, as soon as practicable, and in any event at least 21
4 days before a scheduling conference is held or a scheduling order
5 is due under Rule 16(b), confer to consider the nature and bases of
6 their claims and defenses and the possibilities for a prompt
settlement or resolution of the case, to make or arrange for the
disclosures contemplated by Rule 26(a)(1), and to develop a
proposed discovery plan[.]"

7 No scheduling conference is currently set. Rule 16(b) contemplates such conferences being
8 set approximately 90 days after the appearance of a defendant. Obviously, this schedule is
9 unworkable. Even if plaintiff could convince defendants to meet and confer immediately, the
10 conference would be an idle act. It is inconceivable that defendants will offer to modify their
11 lethal injection procedure unless ordered to do so by a court. Therefore, settlement
12 discussions would be pointless. There is also no point to meet at this point to frame a
13 discovery plan. As discussed in the next section, defendants position is that plaintiff is not
14 entitled to any discovery into critical areas pertaining to the lethal injection procedure.
15

16 Allowing discovery to proceed immediately under the requested expedited
17 procedures balances the interests of both sides. Plaintiff has an interest in developing
18 meritorious constitutional claims that can be litigated as fully as possible before it is too late.
19 Defendants have an interest in having this case litigated as quickly as possible so that, if a
20 preliminary injunction is issued but defendants ultimately prevail, a new execution date can
21 be set sooner rather than later.
22

23 Because good cause exists, this Court should order that discovery may
24 proceed.
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1 C. Defendants Should be Compelled to Produce Documents.

2 1. Procedural History

3 On Monday, December 13, 2004, plaintiff's counsel faxed defendant Warden
4 an informal request for documents that he felt would be necessary to fully and fairly litigate
5 the case in federal court if plaintiff did not obtain administrative relief. (Declaration of
6 Steven S. Lubliner in Support of Motion for Expedited Discovery and to Compel Production
7 of Documents ("Lubliner Decl.") Exh. A.) Plaintiff's counsel asked the Warden to respond to
8 the request by Thursday, December 16, 2004. (Lubliner Decl., Exh. A, p. 4.) Plaintiff's
9 counsel offered to work with the Warden in crafting an appropriate protective order to address
10 any confidentiality concerns. (Lubliner Decl., Exh. A, p. 1.)

11 On the afternoon of December 16, 2004, plaintiff's counsel telephoned the
12 Warden to find out if a response would be forthcoming. (Lubliner Decl., ¶ 3.) The Warden
13 informed counsel that she had turned the request over to the California Attorney General's
14 office. (Lubliner Decl., ¶ 3.) Plaintiff's counsel then telephoned Dane Gillette, who has
15 served as lead counsel from the Attorney General's office throughout plaintiff's state and
16 federal proceedings. (Lubliner Decl., ¶ 4.) Mr. Gillette said that he had seen the request and
17 that nothing would be produced without a court order. Mr. Gillette said that none of the
18 documents referred to in the request were discoverable. (Lubliner Decl., ¶ 4.) The following
19 morning, plaintiff's counsel left a message for Mr. Gillette, asking him to elaborate on his
20 response, i.e., were the materials not discoverable because none of them were relevant to the
21 subject matter of the action or were they not discoverable because plaintiff's offer to enter
22 into an appropriate protective order somehow failed to address defendant's confidentiality
23 concerns. Mr. Gillette did not return the phone call. (Lubliner Decl., ¶ 5.)

2. Documents to be Produced.

Plaintiff sought production of the following documents:

- A complete copy of the current version of San Quentin Operational Procedure No. 770. Plaintiff's counsel currently has the June 13, 2003 revision through page 39. (Lubliner Decl., Exh. B.) This document appears to be incomplete.
- Complete copies of any other publications or writings governing the lethal injection procedure.
- All documents related to the decision to implement lethal injection in California as it is currently practiced.
- A complete copy of the "Execution Security Plan," referred to on p. 2 of the June 13, 2003 revision of Procedure No. 770.
- All documents related to "staff assignments on the execution detail," referred to on p. 12 of the June 13, 2003 revision of Procedure No. 770.
- All documents related to the readiness, operational and equipment checks performed at various intervals preceding the execution, as stated in the June 13, 2003 revision of Procedure No. 770.
- All documents related to the proper control of the necessary chemicals, referred to on p. 12 of the June 13, 2003 revision of Procedure No. 770.
- All documents related to obtaining the lethal injection, referred to on p. 17 of the June 13, 2003 revision of Procedure No. 770.
- All documents related to the Execution Team who will execute Mr. Beardslee, including but not limited to the identities of the team members and the Lieutenant in Charge of the Chamber, the role that each member is to play in Mr. Beardslee's execution, the training that each member has had in his or her intended role, each member's employment history including discipline and complaints, any medical training that they have had at any time, any history of drug use, any criminal records

whether or not resulting in conviction, and any background checks done on the team members.

- All documents related to “the administration of the lethal injection,” referred to on p. 19 of the June 13, 2003 revision of Procedure No. 770.
- All documents related to the State Physician and staff physician, referred to on p. 19 of the June 13, 2003 revision of Procedure No. 770, including but not limited to their identities, employment history, medical training, any history of drug use, criminal history, disciplinary history, history of malpractice or complaints wherever registered and any background checks done on them.
- All documents related to the procedures to be used to monitor Mr. Beardslee’s heart as referred to on p. 19 of the June 13, 2003 revision of Procedure No. 770.
- All documents related to the mixing of the drugs and the preparation of the syringes of sodium pentothal, pancuronium bromide and potassium chloride to be used in the execution process.
- All documents related to the decision not to have a backup syringe of sodium pentothal prepared, while backup syringes of pancuronium bromide and potassium chloride are prepared, as referred to on pp. 26-27 of the June 13, 2003 revision of Procedure No. 770.
- All documents related to procedures to be used to revive Mr. Beardslee in the event a stay or reprieve is issued after the execution process has begun but before it is complete.
- All documents related to what constitutes proper storage of all chemicals and equipment, as referred to on p. 30 of the June 13, 2003 revision of Procedure No. 770.
- All documents related to the “injection team,” as referred to on p. 32 of the June 13, 2003 revision of Procedure No. 770, including but not limited to the qualifications for serving on the injection team, identities of the team members, their employment history including discipline and complaints, medical training, any history of drug use,

1 criminal history whether or not resulting in convictions, and background checks done
2 on the team members.

- 3 • All documents related to the person or persons in the pharmacy who will issue the
4 “necessary agents” to a member of the lethal injection team, as referred to on p. 32 of
5 the June 13, 2003 revision of Procedure No. 770, including but not limited to their
6 identities, employment history, medical training, any history of drug use, criminal
7 history, disciplinary history, history of malpractice or complaints wherever registered
8 and any background checks done on them.
- 9 • All documents related to the procedure for rolling back the lip of the diaphragm on the
10 “Y” injection site, as referred to on page 36 of the June 13, 2003 revision of Procedure
11 No. 770.
- 12 • All documents related to the decision to administer a saline solution between the
13 pancuronium bromide and the potassium chloride, as detailed on the CDC web site.
- 14 • All documents related to the decision to prepare the syringe of sodium pentothal last,
15 as referred to on p. 37 of the June 13, 2003 revision of Procedure No. 770.
- 16 • All documents related to how it is determined when the execution will proceed so that
17 the syringe of sodium pentothal can be prepared, as referred to on p. 37 of the June 13,
18 2003 revision of Procedure No. 770.
- 19 • All documents related to the decision to use a single syringe of five grams of diluted
20 sodium pentothal as opposed to a continuous flow.
- 21 • All documents related to what constitutes a “person qualified, trained or otherwise
22 authorized by law” to insert the angiocath, as referred to on p. 39 of the June 13, 2003
23 revision of Procedure No. 770.
- 24 • All documents related to what constitutes a usable vein, as referred to on p. 39 of the
25 June 13, 2003 revision of Procedure No. 770, and the timing and determination of
26 whether or not Mr. Beardslee has usable veins.

- 1 • All documents related to procedures to be used to execute Mr. Beardslee in the event a
- 2 usable vein cannot be found.
- 3 • All documents related to how it will be determined that a malfunction or blockage in
- 4 the first line exists, as referred to on p. 32 of the June 13, 2003 revision of Procedure
- 5 No. 770.
- 6 • All documents related to how, in the event of a malfunction or blockage in the first
- 7 line during the administration of the sodium pentothal, it will be determined that Mr.
- 8 Beardslee has achieved a level of unconsciousness to allow the execution to proceed.
- 9 • All documents related to how, if Mr. Beardslee has not been rendered unconscious by
- 10 the sodium pentothal, he will be able to communicate that fact to the injection team,
- 11 execution team or assembled witnesses in light of the administration of the paralytic
- 12 agent pancuronium bromide.
- 13 • All execution logs of all prisoners executed by lethal injection.
- 14 • All documents related to the conduct of prior executions in California by lethal
- 15 injection.
- 16 • All documents related to blood tests performed on other inmates executed in
- 17 California by lethal injection, including, but not limited to, toxicology reports
- 18 measuring the presence of the execution chemicals in the bloodstream.

19 As noted above, the Attorney General has taken the position that none of these documents are
20 discoverable. Plaintiff, of course, remains amenable to entering into an appropriate protective
21 order to address defendants' confidentiality concerns.

22
23 Plaintiff is entitled to discovery of all matter relevant to the subject matter of
24 the action. (FRCivP. 26(b).) The subject matter of the action is clear. As Procedure 770 sets
25 out, plaintiff will be put to death by the serial administration of three chemicals: sodium
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1 thiopental¹, pancuronium bromide and potassium chloride. (Lubliner Decl., Exh. B, pp. 26-
2 27.) Sodium thiopental is administered to render the inmate unconscious. Potassium
3 chloride, the last drug in the sequence, stops the heart and causes death. The second drug,
4 pancuronium bromide, is a neurotoxin that will completely paralyze plaintiff's voluntary
5 muscles as well as his breathing.²
6

7 Plaintiffs do not expect defendants to dispute that if plaintiff is not properly
8 anaesthetized by the administration of sodium thiopental, he will experience in order 1) the
9 conscious experience of prolonged suffocation—which in itself is an Eighth Amendment
10 violation—while completely paralyzed, and 2) excruciating, burning pain in his veins from
11 the potassium chloride, another Eighth Amendment violation. Defendants also cannot dispute
12 that completely paralyzing plaintiff by administering pancuronium bromide will prevent him
13 from exercising his First Amendment right to communicate that the execution process has
14 malfunctioned.
15

16 A shocking amount of information about the conduct of the lethal injection
17 procedure has not been made public. Each set of documents seeks information about the
18 procedures by which Mr. Beardslee will be put to death and the qualifications and training of
19 the people responsible for correctly implementing these procedures. The material sought is
20 clearly relevant to the subject matter of the action.
21

22 The "importance of the issues at stake in the litigation, and the importance of
23 the proposed discovery in resolving the issues" outweigh whatever burden that gathering and
24 producing this information may place on defendants. (FRCivP 26(b)(2).) It is unlikely that
25

26 ¹ Sodium thiopental is the generic name of the drug Sodium Pentothal.
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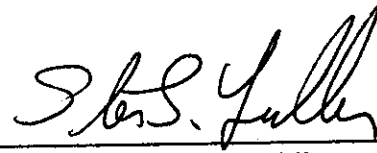
1 the requested information will be more than a couple of banker's boxes. By contrast,
2 plaintiff's interest in vindicating his constitutional rights and in holding California's veiled
3 lethal injection procedure up to public scrutiny cannot be overstated. The documents should
4 be produced.

5 IV. CONCLUSION
6

7 For the foregoing reasons, plaintiff's motions should be granted.

8 Dated: December 20, 2004

9
10 By: _____



11 Steven S. Lubliner
12 Attorney for Donald Beardslee
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27 ² The purpose and effect of these drugs are described in the declaration of Dr. Mark Heath in
28 support of plaintiff's companion motion for a temporary restraining order, preliminary
injunction and order to show cause.

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PROOF OF SERVICE

I, Steven S. Lubliner, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am in practice at the address indicated; am a member of the State Bar of California, the Bar of this Court and the Bar of the Northern District of California; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I served a true and correct copy of the following document(s) in the manner indicated below:

MOTION FOR EXPEDITED DISCOVERY AND TO COMPEL PRODUCTION OF DOCUMENTS

DECLARATION OF STEVEN S. LUBLINER IN SUPPORT OF MOTION FOR EXPEDITED DISCOVERY AND TO COMPEL PRODUCTION OF DOCUMENTS

[PROPOSED] ORDER GRANTING MOTION FOR EXPEDITED DISCOVERY AND TO COMPEL PRODUCTION OF DOCUMENTS

- ☐ by today depositing, at Petaluma, California, the said document(s) in the United States mail in a sealed envelope, with first-class postage thereon fully prepaid (and/or):
- ☒ by today personally delivering the said document(s) to the person(s) indicated below in a manner provided by law, by leaving the said document(s) at the office(s) or usual place(s) of business, during usual business hours, of the said person(s) with a clerk or other person who was apparently in charge thereof and at least 18 years of age, whom I informed of the contents.

Dane R. Gillette
Senior Assistant Attorney General
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664

Executed in Petaluma, California on December 20, 2004

